87-416

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

v.

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The United States Catholic Conference ("USCC") and the National Conference of Catholic Bishops ("NCCB") received subpoenas in a suit brought by respondents Abortion Rights Mobilization, *et al.*, to force the Internal Revenue Service to revoke the tax-exempt status of various entities affiliated with the Roman Catholic Church. The district court held USCC/NCCB in civil contempt for declining to produce internal Church documents pursuant to the subpoenas and imposed fines totaling $100,000 per day for each day the documents were not produced. A divided panel of the court of appeals affirmed.

Questions presented are:

(1) Whether the court of appeals disregarded controlling precedent from this Court by ruling that petitioners, non-party witnesses subject to a final judgment of civil contempt, cannot raise the absence of an Article III case or controversy in challenging the court's constitutional power to issue and enforce process.

(2) Whether private parties have Article III standing to compel the Internal Revenue Service to exercise its discretion to investigate complaints of impermissible political campaign activity by, and to revoke the tax-exempt status of, numerous religious organizations.

PARTIES TO THE PROCEEDING

Lawrence Lader, Margaret O. Strahl, M.D., Helen W. Edey, M.D., Ruth P. Smith, National Women's Health Network, Inc., Long Island National Organization for Women-Nassau, Inc., Rabbi Israel Margolies, Reverend Bea Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, Women's Center for Reproductive Health, Jennie Rose Lifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski, Judith A. Seibel, Karen DeCrow and Susan Sherer are also plaintiffs in the district court and respondents here. Secretary of the Treasury James A. Baker, III, and Commissioner of Internal Revenue Lawrence B. Gibbs are defendants in the district court and respondents here.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The United States Catholic Conference and National Conference of Catholic Bishops petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (A. 1a-43a) is reported at 824 F.2d 156. The May 8, 1986 opinion of the district court holding petitioners in civil contempt (A. 44a-51a) is reported at 110 F.R.D. 337. The May 9, 1986 order of the district court amending its contempt citation (A. 52a-53a) is unreported. Earlier opinions of the district court denying the motions to dismiss (A. 54a-92a; 93a-102a) are reported at 603 F. Supp. 970 and 544 F. Supp. 471, respectively.

JURISDICTION

The opinion of the court of appeals affirming the district court's contempt citation was entered on June 4, 1987. A timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on July 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, section 2 of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

Petitioners United States Catholic Conference and National Conference of Catholic Bishops ("USCC/NCCB") challenge a final judgment of civil contempt for refusing to produce documents pursuant to subpoenas *duces tecum* in *Abortion Rights Mobilization v. Baker*, No. 80 Civ. 5990 (S.D.N.Y.). That case is a suit by respondents, Abortion Rights Mobilization, *et al.* ("ARM"), against the Secretary of the Treasury and the Commissioner of Internal Revenue, seeking an order requiring the government to revoke the tax exemptions of thousands of Catholic Church organizations for engaging in pro-life activi-

ties allegedly inconsistent with the political activity restrictions of Internal Revenue Code § 501(c)(3).[1] USCC and NCCB are distinct organizations with identical memberships. Each is composed of all active Roman Catholic bishops in the United States. Since 1946, petitioner USCC has been the recipient of an annual group exemption letter, exempting under § 501(c)(3) USCC, NCCB and approximately 28,000 Catholic Church entities in the United States.

The district court held petitioners in civil contempt for refusing to surrender the subpoenaed church documents and imposed a $100,000 daily sanction for the failure to produce. A divided panel of the Court of Appeals for the Second Circuit affirmed, holding that petitioners lacked standing to challenge the district court's Article III power to hold them in contempt.

1. *The Complaint*

The amended complaint in *ARM v. Baker* was filed on behalf of nine organizations and twenty private individuals. Three of the groups are tax-exempt organizations that advocate the continuation of legalized abortion. The remaining six are health clinics that perform abortions. Five individual plaintiffs are clergymen who allege that they voluntarily have refrained from participating in political campaigns. The clergymen contend that the government's alleged nonenforcement of § 501(c)(3) against Catholic Church entities violates the Establishment Clause. They do not allege any enforcement, or threatened enforcement, of the code against them personally, or against their chuches. The remaining individual plain-

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[1] I.R.C. § 501(c)(3) exempts from federal income taxation those entities "organized and operated exclusively for religious, charitable, . . . or educational purposes, . . . which [do] not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

tiffs are described primarily as voters.[2] They claim an impairment of their right to vote due to the "distortion of the political process" said to result from uneven enforcement of § 501(c)(3). The plaintiffs also named as defendants USCC/NCCB.

The complaint alleges that various Catholic Church entities have supported or opposed political candidates to advance their belief that unborn life is human and must be protected. It contends that a policy statement, called the Pastoral Plan for Pro-life Activities, adopted by the NCCB in 1975, is the "blueprint for the Church's illegal activities."[3] The complaint then alleges "upon information and belief [that] Roman Catholic priests and other Church officials have actively and systematically participated in political campaigns in all parts of the country . . . ." It cites six examples over a ten-year period, including the fact that "[a]t least one Church has distributed 'right to life' leaflets with the Church bulletin." The complaint seeks an injunction ordering the government to (1) revoke the tax-exempt status of Catholic Church entities; (2) assess and collect all back taxes resulting from the revocation of the Church's tax-exempt status; and (3) notify the Church's contributors that they may not take charitable tax deductions for their contributions.

2. *The Motions to Dismiss*

The government and USCC/NCCB moved to dismiss the complaint on several grounds, including lack of standing. On July 19, 1982, the district court granted the motions in part and denied them in part. *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982) (*"ARM I"*) A. 54a-92a.[4] The court dismissed claims against USCC/NCCB,[5] but held that all plaintiffs (except five clinics) had standing to sue the government. The court found that the clergy plaintiffs had standing directly under the Establishment Clause, since they "have devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology." A. 67a-68a. For similar reasons, one clinic, the Women's Center for Reproductive Health, affiliated with a clergy plaintiff, also had "Establishment Clause standing."

The court further found that all the other individual plaintiffs and three advocacy organizations had standing as voters. This was so, the court said, because the plaintiffs were injured by "a system in which members of the public have greater incentive to donate funds to the Roman Catholic Church than to politically active abortion rights groups and in which each dollar contributed to the church is worth more than one given to non-exempt organizations." A. 73a. The court believed that conclusion also satisfied the causation and redressability requirements of standing, since the "defendants' tax policy is the source of the distortion in the political process that plaintiffs complain of" and "[a]n injunction against that discriminatory policy will restore the proper balance between adversaries in the abortion debate." *Id.* The district court denied the government's motion to certify the question of standing for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Abortion Rights Mobiliza-*

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[2] Assorted other bases for standing were rejected by the district court.

[3] The 1975 Pastoral Plan had as its goal reversing the decline in "respect for human life in our society" by "activat[ing] the pastoral resources of the Church in three major efforts: (1) an educational/public information effort . . . (2) a pastoral effort . . . [and] (3) a public policy effort."

[4] "A." refers to the Appendix to this Petition. The Appendix, because of its length, has been printed separately.

[5] The court held that USCC/NCCB were incapable of violating the Establishment Clause, and had a right to rely on the tax exemption as issued by the IRS. *See ARM I*, A. 83a-84a.

tion, Inc. v. Regan, 552 F. Supp. 364 (S.D.N.Y. 1982) ("*ARM II*").

3. *The Subpoenas*

In March 1983, ARM served subpoenas *duces tecum* on USCC/NCCB. The subpoenas demanded sixteen types of documents in five broad categories: (1) all drafts of the Pastoral Plan for Pro-life Activities, as well as the minutes of the bishops' discussions of its proposed contents, and all documents relating to its implementation; (2) all documents reflecting contact with any candidates for public office anywhere in the United States; (3) all documents reflecting financial support or "involvement" of USCC/NCCB, "or any state Catholic conference, archdiocese, diocese, or parish church," or any "church personnel" (defined to include every employee of each of those organizations), with twelve national and state pro-life organizations; (4) petitioners' tax or information returns and "without limitation, all correspondence, memoranda or other communications relating to the consideration or approval by the Internal Revenue Service" of any application for § 501(c)(3) status; and (5) the identities of the president and executive secretary of the Catholic conferences in sixteen states and the identities of the archbishops or bishops and directors of pro-life activities in eighteen dioceses for the years 1975 to the present.[6]

On April 14, 1983, USCC/NCCB moved to quash the subpoenas, arguing, *inter alia*,[7] that the court lacked Article III jurisdiction. The district court summarily denied the motion on April 4, 1984. The court likewise

[6] This last request is presumably a prelude to planned depositions. Such a list could include more than 160 people—including 55 chairmen or executive secretaries (25 of whom are bishops or archbishops), 18 other bishops or archbishops and 47 auxiliary bishops.

[7] Petitioners also argued that the subpoenas were unduly burdensome and overbroad.

denied the government's motion to stay all proceedings in the case pending this Court's decision in *Allen v. Wright*, 468 U.S. 737 (1984).

On July 3, 1984, this Court held in *Allen* that parents of black public school children lacked standing to sue the Secretary of the Treasury and the Commissioner of Internal Revenue for failing to revoke the tax-exempt status of discriminatory private schools. *Allen* held that the principle of the separation of powers precluded such suits based on claims that the government had failed properly to enforce the law. 468 U.S. at 759-61.

In light of that decision, the government renewed its motion to dismiss the complaint for lack of standing. On March 1, 1985, the district court denied the motion. The court held that *Allen* was distinguishable and refused to modify its earlier decision. *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985) ("*ARM III*") A. 93a-102a. The district court again denied the government's motion to certify the standing question for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

4. *Contempt Proceedings*

On June 20, 1985, after the government's renewed motion to dismiss was denied, ARM moved to hold USCC/NCCB in contempt. USCC/NCCB cross-petitioned for a protective order, arguing that the subpoenas raised serious First Amendment issues that should not be faced while there remained serious doubt about the district court's jurisdiction. On September 5, 1985, the court denied ARM's motion for contempt, but ordered USCC/NCCB to begin production of documents "forthwith."[8]

[8] However, the district court ordered ARM to "narrow" two portions of the subpoenas requesting internal church documents relating to discussions about political candidates and the Pastoral Plan.

Following the court's order, USCC/NCCB requested that ARM agree to a protective order governing use of the documents. Respondents refused and filed a renewed motion for contempt. During the pendency of that motion, the government filed a petition for a writ of prohibition or mandamus in the court of appeals. Because the court of appeals had requested a response from plaintiffs, the district court denied plaintiffs' motion for contempt and stayed compliance with the subpoenas pending the court of appeals' final disposition of the government's petition. The court of appeals summarily denied the petition on January 14, 1986. *In re Baker*, 788 F.2d 3 (2d Cir. 1986) (table).

After the court of appeals' denial of mandamus, respondents once again renewed their motion to hold USCC/NCCB in contempt. On February 26, 1986, the district court denied the renewed motion, but ordered USCC/NCCB to begin production of documents on March 7, 1986. On March 6, 1986, USCC/NCCB delivered to the district judge a letter explaining that they could not, in conscience, produce the subpoenaed records because of their substantial doubt as to the court's jurisdiction. ARM then renewed its motion to hold USCC/NCCB in contempt; USCC/NCCB responded with affidavits detailing the reasons for their refusal to comply with the subpoenas.

On May 8, 1986, the district court granted ARM's motion, holding petitioners in civil contempt of court and imposing a fine of $50,000 per day against each organization for each day the documents were not produced. *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337 (S.D.N.Y. 1986) A. 44a-51a. The sanctions, however, have been stayed throughout the course of the appellate proceedings. *See* 52a-53a, 105a-107a, 108a-111a.

5. *Petitioners' Appeal*

Petitioners appealed, arguing that the district court lacked Article III jurisdiction and was therefore without

constitutional power to issue and enforce its subpoenas. On June 4, 1987, a divided panel of the court of appeals affirmed.[9] In what it styled as a case of first impression, the majority framed "the threshold issue" as "whether the witnesses have standing to challenge their contempt adjudication on the ground that the District Court lacks subject matter jurisdiction over the lawsuit in which they had been obliged to produce evidence." *In re United States Catholic Conference, et al.*, 824 F.2d 156 (2d Cir. 1987), A. 1a, 8a. Relying principally on *Blair v. United States*, 250 U.S. 273 (1919), the majority held that "[w]ith respect to jurisdiction over the underlying action . . . the witness may make only the limited challenge as to whether there exists a *colorable basis for exercising subject matter jurisdiction*, and not a full-scale challenge to the correctness of the District Court's exercise of such jurisdiction." A. 10a (emphasis added).

USCC/NCCB relied, in part, on this Court's holding in *Bender v. Williamsport Area School Dist.*, —— U.S. ——, 106 S. Ct. 1326 (1986), that every appellate court has an obligation to consider *sua sponte* the jurisdiction of the lower court. The court of appeals brushed aside the reliance on *Bender*, stating that standing is simply a question of "subject matter jurisdiction," and that "[a] lack of subject matter jurisdiction does not disable the district court from exercising all judicial power." A. 12a. For support, the majority cited the familiar rule that a court has jurisdiction to determine its own jurisdiction. *Id.* The majority, in declining to follow *Bender*, stated that it was not reviewing "a final judgment in the underlying suit," A. 16a, and that it was "inquiring only whether the District Court had *sufficient jurisdiction* to enable it to adjudicate the witnesses in civil contempt." A. 16a-17a (emphasis added). The

[9] Judge Newman wrote the opinion of the court. He was joined by Judge Kearse, who filed a concurring opinion. Judge Cardamone dissented.

majority concluded that petitioners could "challenge their contempt adjudication only on the limited ground that the District Court lacks even colorable jurisdiction over the underlying lawsuit." A. 18a.[10]

Judge Cardamone dissented,[11] emphasizing that exercises of judicial power by Article III courts in civil cases must derive from the constitutional grant to hear cases and controversies. A. 21a-22a. Judge Cardamone stressed this Court's statement in *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950), that "[t]he judicial subpoena power . . . is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution," A. 24a. He distinguished *Blair* on the basis that "the Grand Jury . . . does not depend on a case or controversy for power to get evidence . . . ." *Id., quoting Morton Salt*, 338 U.S. at 642 (emphasis omitted). Judge Cardamone thus recognized that "both traditional constitutional principles and case law make clear the District Court's power to issue discovery and civil contempt sanctions derives from and is limited by its power over the lawsuit." A. 27a. Consequently, he reasoned that petitioners had standing to challenge the existence of a case or controversy in the district court. Indeed, quoting *Bender*, 106 S.Ct. at 1331, Judge Cardamone stressed that "[w]holly apart from the witnesses' standing, we have an independent and affirmative duty to review the lower court's authority." A. 30a.

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[10] In two paragraphs, the court then found that "colorable jurisdiction" existed. A. 19a-20a.

[11] Judge Kearse filed a brief concurring opinion. It, too, treated standing as an "ingredient" of "subject matter jurisdiction." A. 42a. It concluded that the court's jurisdiction to determine jurisdiction must include the ability to compel evidence designed to establish standing, *id.*, despite the fact that the subpoenas in question do not relate to that issue. *See* description of subpoenas at p. 6, *supra*.

REASONS FOR GRANTING THE WRIT

I. The refusal of the court of appeals to determine plaintiffs' Article III standing conflicts with decisions of this Court and with the text of the Constitution.

An unbroken line of decisions by this Court establishes the fundamental principle that the jurisdiction of federal courts is limited by the provisions of Article III of the Constitution. Article III requires that plaintiffs in federal court have standing to maintain their claims. Absent Article III standing, there is no case or controversy, and a federal court is without constitutional power to act. The majority opinion of the divided court of appeals disregarded this central constitutional principle by affirming a final judgment of civil contempt but refusing to examine whether the district court had the requisite Article III power to act upon the plaintiffs' complaint and enforce their discovery requests.

In affirming the contempt judgment against USCC/NCCB, the court of appeals created a new rule of law by holding that a district court need not have full Article III power, but only "colorable jurisdiction," A. 18a, to enforce civil subpoenas and impose severe contempt sanctions. This new rule squarely conflicts with the decisions of this Court on three important principles of law: (1) that a witness adjudicated in civil contempt has the right to full appellate review of the contempt order, *United States* v. *Ryan*, 402 U.S. 530 (1971); (2) that "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction but also that of the lower courts in a cause under review,'" *Bender* v. *Williamsport Area School Dist.*, —— U.S. ——, 106 S. Ct. 1326, 1331 (1986); and (3) that the power of the district court to issue and enforce process derives from and is dependent upon the existence of an Article III case or controversy, *United States* v. *United Mine Workers*, 330 U.S. 258 (1947). The necessary effect of this new rule is to exempt from Article III

limitations all discovery directed to non-parties in civil litigation.

1. The majority conceded that USCC/NCCB "unquestionably" have the right to appeal the district court's contempt order. A. 8a. According to this Court's established precedent, that right includes the ability to "obtain full review of his claims before undertaking any burden of compliance with the subpoena." *United States* v. *Ryan*, 402 U.S. at 533; *see also Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940). As to the witness, the district court's order is final and failure to consider the constitutional claims now renders the witness "powerless to avert the mischief" of the subpoena. *Cobbledick* v. *United States*, 309 U.S. at 327, quoting *Perlman* v. *United States*, 247 U.S. 7, 12 (1918). Witnesses held in contempt have the right to appellate review because of the real injuries that can flow from compelled compliance with subpoenas *duces tecum*.[12] *See* discussion at p. 18, *infra*.

Having paid lip service to a contemnor's right to appeal, the court of appeals proceeded to emasculate it "by so narrow a view of what an appellate court may review [that it] effectively deprives these contemnors of any meaningful appeal." A. 33a (Diss.). The decision below places a new limitation on the right of a witness to challenge the validity of contempt orders—a limitation that is inconsistent with the right of full review

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[12] In *Maness* v. *Meyers*, 419 U.S. 449 (1975), this Court recognized that, when a trial court orders a witness to reveal information, "[c]ompliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error." *Id.* at 460. In this case, subsequent appellate review, if it should ever be sought by a party after a final judgment, provides USCC/NCCB (and any future witness confronted with a similar situation) no relief at all.

recognized by this Court. This narrow view of the appellate rights of witnesses is particularly disturbing and especially inappropriate where, as here, it involves what this Court has repeatedly stated is the threshold question posed to any federal court—whether, pursuant to Article III of the Constitution, the court has power to act at all.

2. The court of appeals' decision is in open conflict with *Bender* v. *Williamsport Area School Dist.* and the cases on which it is based. It has long been the law that, whether raised by a party, a witness or the court itself, the constitutional power of the lower court to act is always properly at issue on appeal. This Court recently reiterated in *Bender*, 106 S. Ct. at 1331, that this requirement derives from the Constitution itself: "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto."

Because this limitation derives from the Constitution, "[o]n every writ of error or appeal, the first and fundamental question is that of jurisdiction . . . . This question the court is bound to ask and answer for itself, even when not otherwise suggested, and *without respect to the relation of the parties to it.*" *Id.* at 1334 (emphasis added); *accord*, *Juidice* v. *Vail*, 430 U.S. 327, 331-32 (1977); *United States* v. *Corrick*, 298 U.S. 435, 440 (1936); *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934). This obligation also extends to the prudential considerations that underlie the standing doctrine. *Hodel* v. *Irving*, —— U.S. ——, 107 S.Ct. 2076, 2081 (1987). Even where the district or appellate court makes no mention of the standing issue, "if the record discloses that the lower court was without jurisdiction this court will notice the defect" and will maintain jurisdiction "not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States* v. *Corrick*, 298 U.S. at 440.

3. The majority opinion is also at war with this Court's opinion in *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), which expressly held that a civil contempt order cannot survive a finding that the court issuing the order was without subject matter jurisdiction. In *United Mine Workers*, this Court repeatedly stated that the obligation to obey court orders is appropriate only when the "subject matter of the suit [is] . . . properly before the court." *Id.* at 294. Indeed, *United Mine Workers* specifically held that a civil contempt order—such as the one involved in this appeal—is subject to reversal for lack of subject matter jurisdiction:

> It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued, and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court.

Id. at 294-95.[13]

The principle that a civil contempt order can only be imposed by a court with subject matter jurisdiction applies with special force where the basis for the contempt is failure to obey a discovery subpoena. In *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), this Court

[13] Unlike criminal contempt, civil contempt does not attempt to vindicate the authority of a court. *United Mine Workers*, 330 U.S. at 302. The purpose of civil contempt is to coerce compliance with court orders for the benefit of a party and the ongoing proceedings. Thus, it is particularly appropriate that, when the party seeking to invoke the process of the court has no right to be in court, the party not "profit" from the witness' refusal to obey an invalid subpoena.

explained the constitutional limitations on the power of a federal court to issue subpoenas:

> Federal judicial power itself extends only to adjudication of cases and controversies . . . . The judicial subpoena power not only is subject to specific constitutional limitations . . . but also it is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.

Id. at 641-42.[14]

The majority's holding that a court without power under Article III can hold a witness in civil contempt and impose draconian sanctions to coerce compliance with a discovery subpoena so long as it has "colorable" authority disregards this Court's teachings in *United Mine Workers* and *Morton Salt*. The ruling effectively exempts civil discovery orders from the limitations of Article III. Such a rule cannot be reconciled with this Court's consistent rulings that the ability to litigate in the federal courts depends upon the existence of a legitimate case or controversy. As succinctly stated by now Chief Justice Rehnquist in *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464,

[14] The court of appeals responded to *Morton Salt* by stating that constitutional limitations on the court's power apply to "discovery directed at a party that is resisted on the ground that the court lacks subject matter jurisdiction over the lawsuit involving the party," but not to discovery directed to a non-party witness. A. 17a. But the majority offered no principled basis for distinguishing between parties and witnesses concerning the constitutional limitation discussed in *Morton Salt*, and there is none. Article III limitations do not vary according to the identity or status of litigants contesting those limitations. Article III states limits on the power of the courts, not the parties. Thus, parties cannot consent to jurisdiction nor can they be estopped from raising the issue by virtue of their own conduct. *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 377 n.21 (1978); *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951).

475-76 (1982), (*"Valley Forge"*), "of one thing we may be sure: Those who do not possess Article III standing may not litigate as suitors in the courts of the United States."

4. The court of appeals' "colorable jurisdiction" exception to the rule that federal courts must have Article III power to conduct litigation stands alone, unsupported by any precedent. The majority below noted that "[a] lack of subject matter jurisdiction does not disable a district court from exercising all judicial power." A. 12a. But the three narrowly tailored and well-established situations in which a federal court may enforce orders, even if it later turns out jurisdiction is lacking, are not exceptions to Article III, as the majority seemed to believe. Rather they are necessities inherent in the principle that courts must decide their own power under the Constitution. A court always has the power to order discovery to determine its own jurisdiction; to issue injunctions to preserve the status quo pending its decision on that issue; and to enforce such injunctions through criminal contempt. *United Mine Workers*, 330 U.S. at 291-93; *see also United States* v. *Shipp*, 203 U.S. 563, 573 (1906). It follows that a court has the power to punish for violations of such orders to insure that the ability to determine jurisdiction can be exercised—to avoid "the paradox of lacking power to decide its power." A. 37a (Diss.) (footnote omitted).

The subpoenas in this case have nothing to do with aiding the court in determining its jurisdiction. Neither the court below nor the plaintiffs have ever urged that this discovery is necessary to aid the court in determining plaintiffs' standing. They are "ordinary" subpoenas to aid a civil litigant in proving the merits of its case.[15]

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[15] Thus, the point made by the concurring opinion that, in some cases, discovery may be necessary to determine a plaintiff's Article III standing is true, but irrelevant.

The majority's "colorable jurisdiction" rule has no basis in the settled law of this Court, and serves only to justify its departure from Article III limitations.

5. Much of the majority opinion below is based on an unprecedented expansion of this Court's decision in *Blair* v. *United States*, 250 U.S. 273 (1919). *Blair* held that a witness could not challenge a grand jury subpoena by attacking the constitutionality of the statute alleged to have been violated. Based on the statement that a witness "is *not interested* to challenge the jurisdiction of court or grand jury over the subject-matter that is under inquiry," A. 99a (emphasis in majority opinion), quoting *Blair*, 250 U.S. at 279, the court of appeals found in *Blair* a rule of "wider application" never discovered by any other court in the nearly seventy years since that decision.

There is no discussion whatever in *Blair* of the significance of Article III's limitation on federal courts to hear cases or controversies. The focus in *Blair* was on the extraordinary investigative power of the grand jury. Unlike a court in a civil case, a grand jury "does not depend on a case or controversy for power to get evidence, but can investigate merely on a suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Powell*, 379 U.S. 48, 57 (1964). Subsequent cases have carefully distinguished the power of the grand jury from the more limited authority of Article III courts that "depend on a case or controversy for power to get evidence." *United States* v. *Bisceglia*, 420 U.S. 141, 148 (1975); A. 35a n.3 (Diss.) (citing cases). Since it was decided in 1919, not a single reported decision has held that *Blair* disabled an appellate court from examining the Article III power of the district court issuing civil process. The majority puts weight on *Blair* that the opinion in that case simply cannot support.

6. Drawing upon its expanded interpretation of *Blair*, the court of appeals held that USCC/NCCB may not challenge the Article III power of the court below to issue the subpoenas because that question was not "personal" to those witnesses. A. 18a. That statement is remarkable when applied to any witness subject to the subpoena power of the federal courts, but particularly so here where the subject matter of the lawsuit is the continuing tax exemption of the subpoenaed witness.

Although the federal officials are the named defendants, the targets of the lawsuit are the religious organizations. ARM's discovery in the case has to date been directed almost exclusively at USCC/NCCB. The challenged subpoenas seek access to internal church discussions regarding the formulation and implementation of the bishops' position on abortion, as represented by the Pastoral Plan; any contact with any candidate for public office in the United States by any official of the Church; the financial relationship between Catholic institutions and various pro-life organizations; and communications between USCC/NCCB and the IRS.

This case involves a challenge to the tax-exempt status of USCC/NCCB and more than 28,000 separate Catholic organizations within the umbrella group ruling obtained by USCC. The court of appeals reached the anomalous conclusion that USCC/NCCB had an "insufficient interest" in challenging subpoenas directed to attacking their tax-exempt status—a subject about which no one else could possibly have a greater interest. At the same time, the court of appeals found that a coalition of pro-abortion rights activists had sufficient interest to challenge USCC/NCCB's tax exemptions—a subject in which they have no legal interest at all. If the majority opinion is allowed to stand, it will condemn subpoenaed witnesses who are the targets of lawsuits to watch from the sidelines without ever having the opportunity to challenge the constitutionality of the subpoenas.

II. Under this Court's controlling precedent, plaintiffs lack Article III standing to maintain this action and take discovery.

The decisions below that plaintiffs have standing to challenge the IRS's decision regarding the tax status of a third party are in direct conflict with this Court's decision in *Allen* v. *Wright*, 468 U.S. 737 (1984). If left unreviewed,[16] the decisions below not only will permit this case to go forward challenging the tax status of the entities comprising the Catholic Church, but also will encourage other discontented opponents of religious or other tax-exempt organizations to press their policy positions through lawsuits challenging the IRS's administration of the tax code. "Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication." *Allen*, 468 U.S. at 759-60. The Article III question presented here is thus worthy of review not only because the decision below is wrong, but also because it creates an opening for the disruption of the orderly administration of the tax laws and the harassment of religious and other exempt organizations by politically motivated opponents using the process of the federal courts.[17]

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[16] This Court may consider the merits of the Article III standing question even though the court of appeals did not. See *Bender*, 106 S.Ct. at 1331; *United States* v. *Corrick*, 298 U.S. at 440. The question presented is purely one of law and the issues have been fully fleshed out by the two decisions of the district court. A. 54a-92a; 93a-102a.

[17] *See, e.g., American Society of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978) (group of travel agents sued to revoke tax exempt status of American Jewish Congress for allegedly engaging in prohibited business activity); *Khalaf v. Regan*, 85-1 U.S. Tax Case ¶ 9269 (D.D.C. 1985) (Anti-zionist organizations and individuals sued to revoke tax-exemption of Jewish charitable organizations, alleging improper use of charitable contributions to support government of Israel). Both cases were dismissed based upon proper application of standing requirements.

1. In *Allen v. Wright* this Court reexamined the criteria plaintiffs must meet to establish standing under Article III of the Constitution. The facts in *Allen* are not materially distinguishable from this case, and the district court's decisions that plaintiffs here have standing are plainly inconsistent with this Court's holding in *Allen*. In ruling that plaintiffs stated "colorable jurisdiction," the court of appeals did not even cite to *Allen* and engaged in none of the analysis required by this Court to determine plaintiffs' standing.

Plaintiffs in *Allen* were a class of parents of black children who were attending public schools. They filed suit against the Secretary of the Treasury and the Commissioner of Internal Revenue challenging the guidelines and procedures for implementing the requirement that racially discriminatory schools be denied tax-exempt status. 468 U.S. at 739-40. They alleged that certain tax-exempt private schools, not parties to the action, were established in desegregated school districts to make available segregated schools with racially discriminatory policies. *Id.* Plaintiffs claimed injury from an alleged unlawful grant of tax-exempt status by the IRS.

In ruling that the *Allen* plaintiffs lacked standing, this Court recognized that "the 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." 468 U.S. at 750; *see also Valley Forge*, 454 U.S. at 473-74; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). In particular, "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. at 752. The concept of separation of powers—the principle defining the role of the courts in our federal system—prevents plaintiffs here from invoking federal court power to challenge the administration and application of the tax exemption available under section

501(c)(3) to USCC/NCCB and the many other organizations referred to collectively as the Catholic Church.

2. Allowing standing in this case would involve courts in continuing oversight of the IRS's exercise of its broad administrative discretion to monitor and act upon the continued eligibility for tax exemption of thousands of organizations. The decision in *Allen*, if it means anything, means such oversight is not a proper role for the federal courts. The salutary policy of judicial deference to the Executive Branch is particularly appropriate where, as here, the complaint is that the Executive Branch failed to act. An agency decision regarding enforcement proceedings "has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.' U.S. Const., art. II, § 3." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).[18]

Sensitivity to the proper role of the judiciary is especially important where, as here and in *Allen*, plaintiffs complain about application of criteria for maintaining section 501(c)(3) status.[19] The political activity restric-

[18] The district court failed completely to consider the administrative expertise of the IRS on the questions at issue in this case or the interference with executive discretion required to grant plaintiffs relief. The district court's conclusion that accepting jurisdiction in this and similar cases would merely involve a determination of whether the agency had properly "observed Congress' commands" is a manifest oversimplification and is fundamentally at odds with the prudential limitations set by this Court. *See ARM III*, A. 101a-102a.

[19] The courts and Congress have been especially reluctant to permit interference with IRS judgments and determinations regarding application of the Code. *See National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472-77 (1979); *Bingler v. Johnson*, 394 U.S. 741 (1969); *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *American Society of Travel Agents, Inc. v. Blumen-*

tion at issue in this case is only one of several imposed upon exempt organizations under the statute and regulations. Enforcement of that restriction involves myriad judgments on issues ranging from the permissible content of voter education projects by exempt organizations to what may be written in the religious press during election campaigns.[20] *See, e.g.*, Revenue Ruling 78-248, 1978-1 C.B. 154; Revenue Ruling 80-282, 1980-2 C.B. 178. To allow this case to go forward would open the courthouse to plaintiffs seeking to impose their own interpretations and priorities on the agency charged with the responsibility of enforcing the Code.

This Court recently emphasized that discretionary judgments regarding enforcement actions are ill-suited to judicial review:

> The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Heckler v. Chaney, 470 U.S. at 831-32.[21] Where, as here, plaintiffs challenge not an agency's interpretation of the law, but rather its decision whether to initiate enforcement proceedings against a third party, courts are not empowered to second-guess the agency's discretionary judgment and force a different allocation of resources. *Id.*; *see Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). The district court's decisions ignore this allocation of power to the Executive Branch and permit private plaintiffs and the courts to become super regulators, questioning the decisions of the IRS with respect to third-party taxpayers.

3. Plaintiffs here, as in *Allen*, fail to meet the traditional three-part test of injury, causation and redressability necessary to maintain an action consistent with Article III requirements. *Allen v. Wright*, 468 U.S. at 751; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44-46 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975).

The district court held that certain plaintiffs had standing under the Establishment Clause because their "religiously inspired mission is denigrated by government endorsement of a theology contrary to [their] guiding principles." *ARM I*, A. 68a. But, as this Court expressly held in *Allen*, plaintiffs must show a direct personal harm flowing from the alleged illegal conduct. Stigmatic in-

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thal, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978).

[20] The limitations articulated by the Court in *Allen* are thus especially important in this case because the IRS may have a sensitivity to difficult First Amendment problems that individual opponents of exempt organizations and courts considering their challenges may lack. Adding another layer of review by permitting disgruntled opponents of religious organizations to bring suit challenging the IRS's judgment would seriously compound the constitutional and practical problems inherent in limiting the speech of religious organizations. *See McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring); *Walz v. Tax Commission*, 397 U.S. 664, 670 (1970).

[21] *Heckler v. Chaney* involved not constitutional standing but the reviewability of an agency's decision under the Administrative Procedure Act, 5 U.S.C. § 701. Nevertheless, the Court's decision on the appropriate role of the federal courts in reviewing agency enforcement decisions is equally applicable to the prudential limitations at issue in this case.

jury, or denigration of one's belief that comes from alleged illegal government conduct, is not enough.

> If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). Constitutional limits on the role of the federal courts preclude such a transformation.

Allen, 468 U.S. at 755-56 (footnote omitted). *See also Valley Forge*, 454 U.S. at 489-90. It is just such a role that the district court has permitted the plaintiffs to assume in this case. A minister in New York is challenging the government's grant of a tax exemption to the Archdiocese of San Antonio, Texas. A women's organization in Long Island is contesting the government's alleged failure to monitor the activity of a parish priest in South Dakota. There is no limiting principle in the district court's opinion that recognizes the properly defined role of federal courts demanded by this Court in *Allen*.

4. This Court in *Simon* and again in *Allen* unequivocally stated that where plaintiffs challenge the tax status of a third party, standing analysis is deficient absent a focus on the conduct of the tax-exempt organization. *Simon*, 426 U.S. at 44-46; *Allen*, 468 U.S. at 757 n.22. The district court granted certain plaintiffs standing under the rubric of "voter standing," based upon their claimed injury as campaign contributors because their

donations are alleged to be worth less than tax-deductible donations to church-related entities. *ARM I*, A. 73a; *ARM III*, A. 98a-99a. It did so without examining whether the government conduct was responsible for the claimed injury or whether the conduct of the third party taxpayers would be affected by the requested relief. But, as this Court held in *Allen*, even if the complaint states a cognizable injury, it cannot "support standing because the injury alleged is not fairly traceable to the Government conduct . . . challenge[d] as unlawful." *Allen*, 468 U.S. at 757. The flaw in the plaintiffs' argument in both *Allen* and this case is that, although they "claim indifference as to the course the [tax-exempt organization] would take," *id.* at 749, the ability to redress any claimed injury, beyond the mere complaint about government violation of the law, depends entirely on the response of the third-party taxpayer.

The failure of the courts below to recognize this fundamental aspect of standing analysis is demonstrated by the absence of any discussion of the impact of a favorable decision on plaintiffs' claimed injury. The plaintiffs' only alleged injury is that the claimed prohibited activity of the church disadvantages them in the political arena. The district court concluded that plaintiffs' "injury" [22] could be redressed by placing church entities on an "equal footing" in the political arena by taking away their tax exemptions. *ARM III*, A. 99a. But, if this

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[22] Although plaintiffs continue to refer to themselves as "voters," they allege nothing in this case that remotely affects their right to vote. Unlike parties in true voter standing cases, plaintiffs here do not complain of any governmental action that restricts their right to vote for certain candidates, *see O'Hair v. White*, 675 F.2d 680 (5th Cir. 1982), makes their vote less significant when compared with others, *see Baker v. Carr*, 369 U.S. 186, 208 (1962), or makes the voice of their representative less significant than others, *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983). Thus, they do not state any voter injury.

remedy has no effect on the exempt organization's participation in the political process, plaintiffs will merely *feel* better because the taxpayer has been punished by a withdrawal of its tax exemption. Their position in the political arena vis-a-vis Catholic Church entities will be unchanged. Thus, the redressability of plaintiffs' complaint of injury in the political process, no matter how they touch it, is dependent on whether a withdrawal of the tax exemption of church entities would lead them and their contributors to alter their conduct. *Allen*, 468 U.S. at 758; *Simon*, 426 U.S. at 42-46.

The speculation required here to find a causal link between defendants' failure to revoke the exempt status of USCC/NCCB and the competitive disadvantage the plaintiffs complain they experience in the political arena is far more attenuated than in *Simon* or *Allen*. In *Simon*, several indigents and organizations of indigents sued to challenge a revenue ruling under section 501(c)(3) that they claimed encouraged hospitals to offer fewer services to indigents. This Court held, as a matter of law, that "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42-43. Moreover, "[i]t is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services." *Id.* at 43. This Court undertook a similar analysis in dismissing plaintiffs' claim in *Allen* and held that it was "entirely speculative" whether withdrawal of the tax exemption of racially discriminatory schools would have any impact on the ability of respondents' children to receive a desegregated education. 468 U.S. at 758.

Here, the plaintiffs attribute their alleged competitive disadvantage to how unknown potential contributors to religious organizations will respond to the religious organizations' loss of their tax exemptions. The district court must have assumed that (i) such contributors necessarily donate their money to exempt Catholic entities to obtain tax benefits, (ii) such donations will necessarily decrease if the exemption is removed, and (iii) the church entities would therefore spend less money in promoting their view that abortion is immoral and should be against the law. Such facile assumptions ignore the myriad actors and the myriad motives that influence contributors' decisions whether to donate money and exempt organizations' decisions how to spend it. The district court's ruling eschewed the discrete causation analysis required by *Simon* and *Allen* and produced a ruling based on the "unadorned speculation" rejected by this Court. *Simon*, 426 U.S. at 44.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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